

FCC MAIL SECTION

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Before the  
FEDERAL COMMUNICATIONS COMMISSION

FCC 92M-968

DISPATCHED BY Washington, D.C. 20554

In the Matter of )  
 )  
Order to Show Cause Directed Against )  
 )  
MARIO J. GABELLI )  
 )  
and )  
 )  
GABELLI FUNDS, INC. )  
 )  
WWOR-TV, Inc., Channel 9, )  
Secaucus, New Jersey )

MM DOCKET NO. 92-201✓

04222

MEMORANDUM OPINION AND ORDER

Issued: September 22, 1992 ; Released: September 23, 1992

1. Under consideration are a "Motion for Clarification of Order to Show Cause" filed by Mario J. Gabelli and Gabelli Funds, Inc. (collectively referred to as Gabelli) on September 4, 1992, and "Mass Media Bureau's Comments on Motion for Clarification of Order to Show Cause" filed by the Bureau on September 11, 1992.

2. Gabelli requests that the Order to Show Cause (Order) in this proceeding be clarified by the issuance of a ruling that it "does not authorize the assessment of any forfeiture in this proceeding"; that the Order does not constitute a "citation" to which 47 U.S.C., Section 503(b)(5) refers; that the Order does not provide a "reasonable opportunity for a personal interview" and that such an opportunity cannot be provided until after the present hearing; and that the Order is an "unartful attempt to combine inconsistent enforcement vehicles."

3. The request for clarification was discussed at the prehearing conference on September 9, 1992. At that time (and in its pleading), the Bureau agreed with Gabelli that the Order to Show Cause, by itself, does not invoke the forfeiture provisions of Section 503(b)(3) or 503(b)(4) of the Communications Act of 1934, as amended. Indeed, pursuant to statute, before the Commission can issue a Notice of Apparent Liability pursuant to Section 503(b)(4) or determine a forfeiture penalty after notice and opportunity for hearing pursuant to Section 503(b)(3), it must comply with the provisions of Section 503(b)(5) for nonlicensees such as Gabelli. Section 503(b)(5)

requires that the Commission send "a citation of the violation charged" to Gabelli; and to thereafter provide Gabelli with "a reasonable opportunity for a personal interview with an official of the Commission<sup>1</sup> . . . ." If Gabelli, subsequent to the personal interview, engages in "conduct of the type described in" the citation, the Commission can then invoke the forfeiture procedure of Section 503(b)(4) or 503(b)(3). Thus, it is clear that the Order to Show Cause does, in fact and law, constitute a "citation" within the purview of Section 503(b)(5). The nature of the violations charged are set forth in paragraphs 2 and 3 of the Order to Show Cause. Therein, the media holdings of Gabelli, of which the Commission was aware at that time, are set forth, and those media holdings are declared to be in violation of Sections 73.3555 and 76.501(a) of the Commission's rules (47 C.F.R. Sections 73.3555, 76.501 (a)), and Section 613 of the Communications Act of 1934, as amended. (See, paragraph 3 of the Order to Show Cause). Thus, Gabelli's request that the Order be clarified to hold that it does not constitute a "citation" is rejected.

4. At the prehearing conference in this proceeding on September 9, 1992, the Presiding Judge directed counsel to schedule the "personal interview" set forth in paragraph 10 of the Order to Show Cause. The Presiding Judge has been advised by a copy of a letter from Bureau counsel to counsel for Gabelli dated September 11, 1992, that the "personal interview" has been tentatively scheduled for September 21, 1992, at the Commission's offices in Washington, D.C. Thus, Gabelli has been given a reasonable opportunity for a personal interview with an official of the Commission, and this requirement of the statute has been satisfied. There is no support for Gabelli's assertion that the Presiding Administrative Law Judge is the official of the Commission who has to conduct the personal interview, and that such personal interview must not occur until after the Show Cause proceeding is resolved.<sup>2</sup> Gabelli has been issued a citation charging violations of Sections 73.3555 and 76.501(a) of the

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1 Gabelli suggests that the "official of the Commission" in this case is the Presiding Administrative Law Judge. This suggestion is plainly wrong for the reasons stated by the Presiding Judge at the prehearing conference. There is no reason stated why counsel for the Bureau cannot be the "official of the Commission" who conducts the personal interview.

2 Gabelli argues that the Commission cannot institute a forfeiture proceeding until after the Cease and Desist Order becomes effective and is thereafter violated. However, no citation in support of this argument is given nor is any reasonable argument advanced why the Commission must defer proceeding under forfeiture, particularly in view of the Show Cause Order which charges Gabelli with violations of the cited rules and statutes. (See, paragraphs 2 and 3 of the Order to Show Cause.)

Commission's rules and Section 613 of the Communications Act of 1934, as amended. Continued violations of these provisions on the part of Gabelli following the personal interview may subject Gabelli to the forfeiture provisions of Section 503(b)(3) or Section 503(b)(4). Thus, Gabelli is placed on notice that his continued media holdings in violation of the cited rules and statute are held at his peril.<sup>3</sup>

5. Finally, Gabelli cites no support for its arguments that the Commission cannot proceed against Gabelli by a Show Cause Order looking toward a Cease and Desist Order at the same time as it considers the possible imposition of forfeiture. These remedies are not mutually exclusive or inconsistent, and Gabelli has not shown to the contrary.<sup>4</sup>

Accordingly, IT IS ORDERED that the "Motion for Clarification of Order to Show Cause" filed by Mario J. Gabelli and Gabelli Funds, Inc., on September 4, 1992, IS GRANTED to the extent reflected above, and IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph Stirmer  
Chief Administrative Law Judge

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3 The statute authorizes a forfeiture penalty "not to exceed \$10,000 for each violation or each day of a continuing violation" . . . "not to exceed a total of \$75,000 for any single act or failure to act . . . ." (See, Section 503(b)(2)(c).) Thus, each separate rule violation or statute violation can give rise to a potential \$10,000 forfeiture, up to a total of \$75,000 for each day of a continuing violation. For example, if there are continuing violations of two separate rules, then the potential forfeiture can be \$150,000.

4 See, for example, the Commission's "Order to Show Cause and Notice of Forfeiture" in David R. Price, 6 FCC Rcd 2585 (1991), wherein the Order to Show Cause looked toward the possible revocation of license for Station WOKJ(AM) and also the imposition of a forfeiture.